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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

WALTER ALLEN
Petitioner,

v.

ILLINOIS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRCT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Walter Allen was convicted of first-degree attempted murder, attempted armed robbery, and aggravated battery by a jury in the Circuit of Cook County, Illinois on October 5, 2005. The Illinois Appellate Court unanimously vacated and reversed Mr. Allen's 2005 Conviction and remanded for a new trial. Mr. Allen then pursued an appeal of his conviction for a probation violation which was explicitly premised on his 2005 Conviction. Without addressing Mr. Allen's arguments that the court should reverse his probation violation conviction and sentence because the underlying 2005 Conviction on which it was based was reversed, the Illinois Appellate Court instead held as void the original probation sentence Mr. Allen received in 2000 for an unrelated drug conviction and remanded for a resentencing hearing on that crime. Mr. Allen filed a Petition for Leave to Appeal to the Illinois Supreme Court. The Illinois Supreme Court denied that petition on January 28, 2009. The Illinois Appellate Court's decision holding Mr. Allen's probation sentence void nearly eight years after Mr. Allen received that sentence conflicts with decisions of other state high courts and federal court of appeals and raises the following important questions of federal constitutional law which this Court has either not yet addressed or has addressed but in a manner that conflicts with the decision of the Illinois Appellate Court:

1. Whether the Illinois Appellate Court's holding that a "void" sentence can be challenged "at any time" without limitation violates the guarantee of Due Process found in the Fourteenth Amendment to the United States Constitution as recognized by numerous lower federal courts and other state courts (as answered by the Illinois Appellate Court, a State is free to declare a sentence "void" without any limitation—even if decades have passed since the sentence was originally issued);

2. Whether the Illinois Appellate Court's holding that probation can never be considered "punishment" for double jeopardy purposes violates the guarantee against double jeopardy found in the Fifth Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment (as answered by the Illinois Appellate Court, the Double Jeopardy Clause can never apply to a case involving a probation sentence); and

3. Whether the Illinois Appellate Court's rejection of Mr. Allen's prosecutorial vindictiveness claims stemming from the State's decision to seek to void Mr. Allen's probation sentence following Mr.

Allen's successful appeal of his underlying 2005 conviction violates this Court's application of Due Process in *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974).

Petitioner, Walter Allen, respectfully petitions this Court to review the decision of the Illinois Appellate Court.

PARTIES TO THE PROCEEDING

The petitioner is Walter Allen, the defendant and defendant-appellant in the courts below. The respondent is the State of Illinois, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter Allen respectfully petitions for a writ of certiorari to review the judgment of the Illinois Appellate Court, First District. The Illinois Appellate Court, First District, is the last state court to have reviewed these matters because the Supreme Court of Illinois denied Mr. Allen's petition for leave to appeal.

OPINIONS BELOW

The November 3, 2008 opinion of the Illinois Appellate Court in *People v. Allen*, 898 N.E.2d 136 (Ill. App. Ct. 2008), declaring Mr. Allen's probation sentence void and remanding him for a new sentencing hearing is attached as Appendix A hereto. The unpublished order of the Illinois Supreme Court denying Mr. Allen's timely Petition for Leave to Appeal is attached as Appendix B hereto. The opinion of the Illinois Appellate Court reversing Mr. Allen's underlying 2005 conviction is attached as Appendix C hereto.

STATEMENT OF JURISDICTION

The Illinois Appellate Court issued its decision declaring Mr. Allen's probation sentence void and remanding for a new sentencing on November 3, 2008. Pet. App. A. Mr. Allen's timely Petition for Leave to Appeal to the Illinois Supreme Court was denied on January 28, 2009. Pet. App. B. This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

For the Court to appreciate the constitutional issues presented here, it is critical for this Court to understand the exceptional course of events that have led this issue to be raised at this time before the Court. Mr. Allen's appeal began with the Illinois Appellate Court reversing his 2005 Conviction, but subsequently denying his appeal of a probation violation that was directly related to that conviction. The sequence of events is of paramount importance.

A. Introduction

This appeal began with Walter Allen's direct appeal, by and through his current *pro bono publico* counsel, Jenner & Block LLP, of his October 5, 2005 jury conviction ("2005 Conviction") for first-degree attempted murder, attempted armed robbery, and aggravated battery with a firearm involving Four Star Dry Cleaners ("Cleaners") located at 3115 West Roosevelt Road in Chicago. On September 28, 2007, the Illinois Appellate Court unanimously vacated and reversed the 2005 Conviction and remanded for a new trial. *See People v. Allen,* 875 N.E.2d 1221 (Ill. App. Ct. 2007) (attached in the Appendix hereto). Mr. Allen then pursued an appeal of his conviction for a probation violation which was explicitly premised on his 2005 Conviction. Without addressing Mr. Allen's arguments that the court should reverse his probation violation conviction and sentence because the underlying conviction on which it was based was reversed, the Appellate Court (eight

years later) instead held as void the original probation sentence Mr. Allen received in 2000 for a totally unrelated crime and remanded for a resentencing hearing on that crime.

B. 2005 Conviction

In the spring of 2001, there were two crimes committed at the Cleaners. The first was an armed robbery that occurred on March 22, 2001. (R. V. 1, 4/12/05, pp. 19-20.)[1] The second was an attempted armed robbery that occurred almost a month later, on April 17, 2001. Mr. Allen was arrested for both attempted robberies, but has only been tried and convicted for the second one.[2] On October 5, 2005, Mr. Allen was found guilty of first-degree attempted murder, attempted armed robbery, and aggravated battery with a firearm ("2005 Conviction") associated with the April 17 crime after a jury trial in *People v. Allen,* Case No. 01 CR 11362. (R. V. 8, pp. 187-88.) On April 28, 2006, the court sentenced Mr. Allen to 29 years for the Class X felonies of first-degree attempted murder and aggravated battery with a firearm, to run consecutively to 14 years for the

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[1] The record on appeal is divided into 18 principle volumes. The first six volumes consist of the common law record and are cited by page number as "C__," *e.g.*, "C246." The report of proceedings consists of twelve volumes and is cited by volume number and page number as "R. V. __, pp. __," *e.g.*, "R V. 1, p. 19." Several volumes have multiple days of proceedings bound together, and citations to those volumes incorporate the date of the proceeding, *e.g.*, "R. V. 1, 4/12/05, pp. 19-20."

[2] Trial proceedings for the March 22, 2001 crime are currently pending.

second attempted robbery for a total of 43 years. (R. V. 11, 4/27/2006, pp. 94, 98-99.)

C. Violation of Probation Proceedings

On February 15, 2007, the trial court found that—because of the 2005 conviction—Mr. Allen had violated his probation (i.e., the probation he received in connection with his 2000 conviction). (See R. K-18-K-10.) The only evidence offered to prove Mr. Allen's violation of probation during the violation hearing consisted of the transcript of the 2005 Conviction trial testimony, the trial exhibits, the trial stipulations, and the certificate of Mr. Allen's 2005 conviction. (R. at K-6.) Mr. Allen stipulated to the admission of all of the evidence from his 2005 trial. (R. at K-7.) As a result, the court heard no live testimony during the hearing and considered no additional evidence beyond the evidence from the 2005 trial. (*See id.*) At the probation revocation hearing, the attorney for the State represented that "[he didn't] think there's any dispute between the parties that the basis of the violation of probation is that April 17, 2001 incident." (*See* Transcript of 2/15/07 Proceedings at K-3.) On April 17, 2007, the court sentenced Mr. Allen to 25 years on the probation violation. On May 4, 2007, Mr. Allen timely filed a motion for a new hearing on violation of probation and motion for reduction of sentence. On June 11, 2007, the court denied Mr. Allen's motions for a new hearing and reduction of sentence. Mr. Allen timely filed a notice of appeal on June 15, 2007.

D. Reversal of 2005 Conviction

On September 28, 2007, the Illinois Appellate Court unanimously reversed Mr. Allen's 2005 Conviction and remanded for a new trial. *Allen,* 875 N.E.2d at 1234.[3] The State petitioned for leave to appeal to the Illinois Supreme Court. Mr. Allen requested—and the State did not oppose—that the Appellate Court stay the appeal of the probation violation conviction pending the resolution of the State's petition for leave to appeal the Appellate Court's decision reversing Mr. Allen's underlying conviction.

On December 13, 2007, the Appellate Court stayed Mr. Allen's appeal of the probation violation conviction pending the resolution of the State's Petition for leave to appeal. Subsequently, on January 30, 2008, the Illinois Supreme Court denied the State's petition for leave to appeal the Appellate Court's reversal of Mr. Allen's 2005 Conviction. The State then moved that Court to reconsider its denial of the State's petition for leave to appeal. On March 11, 2008, the Illinois Supreme Court denied that request as well.

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[3] The remand proceedings are currently pending.

E. Violation of Probation Appeal Proceedings

1. Mr. Allen's Motion to Lift Stay and For Summary Reversal of His Conviction for Probation Violation

On April 15, 2008, in light of the Illinois Appellate Court's disposition of Mr. Allen's 2005 Conviction which served as the basis for Mr. Allen's probation violation, Mr. Allen filed with the Appellate Court a Motion to Lift Stay and For Summary Reversal of His Conviction for Probation Violation. Mr. Allen explained that, because the 2005 Conviction was the sole basis for his probation violation, the probation violation must be vacated. On April 25, 2008, the State filed its Response to Mr. Allen's Motion. The State agreed the stay should be lifted, but argued that no summary reversal should be granted because there is a remand and a new trial. (St. Resp. Mot. ¶ 16.)

2. State's Motion to Vacate Mr. Allen's Original Probation Sentence

In addition to filing its Response opposing Mr. Allen's request for summary reversal, for the first time in almost eight years, the State filed a separate motion to vacate Mr. Allen's original probation sentence imposed in 2000. The State contended at this very late juncture—eight years after the probation sentence, a year after pursuing a 25-year probation violation sentence, and months after Mr. Allen prevailed on his appeal of the 2005

Conviction—that the original probation sentence was now void.

Eight years ago, on November 3, 2000, Mr. Allen was convicted of a drug offense in the matter of *People v. Walter Allen,* Case No. 00 CR 8226 02 ("2000 Drug Conviction"). Mr. Allen's current counsel did not represent him. The drug offense was for possession of a controlled substance with intent to deliver heroin within 1000 feet of a building used for religious worship. On January 10, 2001, during a sentencing hearing for that 2000 Drug Conviction, the Cook County Circuit Court sentenced Mr. Allen to twenty-four months probation. The court stated, "so the remand is he should be discharged from county Jail. He is placed on probation, open mandate TASC, under Section 91-1/2 (currently 405 ILCS 15/1), which is taking into consideration the Mental Health Code." (C.L.R.., V. II, p. 372). On August 10, 2001, the State filed a petition arguing that Mr. Allen's probation sentence for his 2000 Drug Conviction should be revoked in light of his arrest for the April 17, 2001 attempted murder and attempted armed robbery case (i.e., the arrest that ultimately led to the 2005 Conviction that the Appellate Court reversed).

3. Illinois Appellate Court Decision

On May 30, 2008, the Illinois Appellate Court denied both Mr. Allen's and the State's motion, lifted the December 13, 2007 stay of Mr. Allen's appeal of probation violation, and ordered the parties to proceed with briefing of the issues. In response to Mr. Allen's appeal of the 25-year probation violation sentence that the State pursued, the State argued—as it did in its motion—that the Appellate Court should now void Mr. Allen's original probation sentence he received in 2000 and remand for a new sentence hearing on the 2000 Drug Conviction. (St. Br. 5.) On November 3, 2008, the Appellate Court agreed with the State and held as void Mr. Allen's probation sentence, vacated his probation revocation conviction and sentence, and remanded the cause for resentencing only on Mr. Allen's 2000 possession of a controlled substance conviction in accordance with the proper statutory mandates. *See People v. Allen*, 898 N.E.2d 136, 145 (Ill. App. Ct. 2008) (attached in the Appendix hereto). In reaching its decision, the Appellate Court rejected Mr. Allen's Due Process and Double Jeopardy arguments. *Id.* at 142-45. The Appellate Court relied on *People v. Whitfield*, 228 Ill. 2d 502, 510 (2007), holding that it "is bound by [Illinois] supreme court precedent, which clearly provides 'a sentence which is contrary to statutory requirement is void and can be corrected at any time.'"

F. The Illinois Supreme Court Denies Leave to Appeal

Following the Illinois Appellate Court's decision, Mr. Allen filed a timely Petition for Leave to Appeal to the Illinois Supreme Court on December 8, 2008. On January 28, 2009, the Illinois Supreme Court issued an order denying Mr. Allen's leave to appeal.

REASONS FOR GRANTING THE WRIT

I. The Illinois Appellate Court's Holding that a "Void" Sentence Can Be Challenged "at Any Time" without Limitation Violates the Constitutional Right to Due Process of Law and Represents a Split among State and Federal Courts Addressing the Issue.

This Court should grant review because the Appellate Court's decision reflects a fundamental misunderstanding of Due Process. This Court should make clear that Due Process places temporal limits on the ability of the State to seek to void a past sentence. At a minimum, the Court should at least take the appeal to clarify federal constitutional law and provide guidance to the state and lower federal courts on the issue of the Due Process limitations to the voidness doctrine.

In voiding Mr. Allen's probation sentence, the Appellate Court declared that a void sentence "can be corrected at *any time*." *People v. Allen*, 898 N.E.2d 136, 143 (Ill. App. Ct. 2008) (*quoting People v. Whitfield*, 888 N.E.2d 1166, 1171 (Ill. 2007)). Without consideration of the absurd and potentially unfair results inherent in such a misguided rule, the Appellate Court concluded, it was "bound by [Illinois] Supreme Court precedent" to rule as it did. *Id.*

The United States Constitution guarantees a defendant the right to Due Process. U.S. Const. amend. XIV. As this Court has recognized, "due

process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Appellate Court's decision violates this fundamental rule of federal law.

Moreover, the Appellate Court's Decision, if not overturned, would place Illinois at odds with other jurisdictions that have recognized that Due Process places limits upon the length of time the State has to challenge a void sentence. Other courts around the country, including federal courts of appeal, have recognized that in accordance with Due Process, "the power of a sentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit." *Breest v. Helgemoe*, 579 F.2d 95, 101 (1st Cir. 1978); *accord DeWitt v. Ventetoulo*, 6 F.3d 32, 35-36 (1st Cir. 1993); *United States v. Lundien*, 769 F.2d 981, 987 (4th Cir. 1985); *Baker v. Barbo*, 177 F.3d 149, 158 (3d Cir. 1999); *State v. Clames*, 632 N.W.2d 641, 647 (Minn. 2001); *State v. Lane*, 957 P.2d 9, 19 (Mont. 1998); *State ex rel Hill v. Parsons*, 461 S.E.2d 194, 197 n.10 (W. Va. 1995).[4]

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[4] In addition to the federal courts of appeals and state high courts that have recognized the limitations of Due Process, several lower federal and state courts have done so as well. *See Warner v. United States*, 926 F. Supp. 1387, 1396 (E.D. Ark. 1996; *United States v. Aguilar-Andrade*, No. 94 C 6519, 1996 WL 568789, at *4 (N.D. Ill. Oct. 3, 1996); *Beliles v. State*, 663 N.E.2d 1168, 1172 (Ind. Ct. App. 1996); *Gonzalez v. Comm'r of Corr.*, No. CV 870368, 1991 WL 27864, at *2 (Conn. Super. Ct. Jan. 14, 1991)

This Court, however, has never addressed the specific issue of the Due Process limitations on the power of a court to declare a sentence void. In the absence of a decision on point from this Court, other federal courts of appeal and state high courts have created a split from the courts cited above by holding, as the Illinois Appellate Court held, that a void sentence may be corrected at any time. *See, e.g.*, *Burns v. United States*, 552 F.2d 828, 831 (8th Cir. 1977); *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005); *State v. DeWitt*, 557 A.2d 845, 847 (R.I. 1989). As a result, this Court should grant review to ensure that courts across the country apply federal Due Process principles uniformly in all jurisdictions.

In the absence of such clarification, the Illinois Appellate Court's decision opens the door for potentially more absurd results. To allow such a misguided rule would give the State the ability to seek to void the sentence of a person convicted of a crime, no matter how far back in that person's past that crime occurred and even if that person has completed serving the sentence. As long as some technical flaw in the sentence renders it void as contrary to statutory requirements, an individual can never live free of the fear that he may be resentenced for an age-old crime. The slightest possibility of an error in any sentence, no matter how seemingly correct the sentence or even if fully served, would hang forever like a Sword of Damocles over the defendant's head. By the Illinois Appellate Court' logic, a person who received a probation

sentence decades—indeed, *any* amount of time, however long—in the past and who has since lived a perfectly peaceful and law-abiding life could find himself faced with a new prison sentence for his past crime. This Court should make clear that Due Process does not allow such absurd and fundamentally unfair results.

Moreover, the Illinois Appellate Court's decision places defendants who at some point in their past received a sentence that did not technically comply with statute in a fundamentally unfair position. Such defendants are left with an impossible choice of either (1) appealing an underlying conviction and a resulting probation violation, of which they may well be innocent, and opening the door to the State's attempt to void their original probation sentence or (2) abdicating their right to appeal to avoid that possibility. This Court should make clear that the constitutional guarantee of Due Process prevents the State from forcing a defendant into this impossible choice.

II. The Illinois Appellate Court's Holding That Probation Can Never Be "Punishment" for Double Jeopardy Purposes Creates a Conflict with the Precedent of Other Federal Courts and Violates the Constitutional Protection Against Double Jeopardy.

In its single-paragraph rejection of Mr. Allen's Double Jeopardy argument, the Illinois Appellate Court expanded a previous decision by the Illinois Supreme Court to encompass a complete denial of the protections against Double Jeopardy in any case involving a probation sentence. The Appellate Court relied entirely on the Illinois Supreme Court's statement that "a defendant sentenced to probation, and then sentenced to imprisonment for the same offense, is not subjected to an unconstitutional second punishment for double jeopardy purposes." *People v. Allen*, 898 N.E.2d 136, 143 (Ill. App. Ct. 2008) (*quoting People v. Whitfield*, 888 N.E.2d 1166, 1176 (Ill. 2007)). In the case upon which the Illinois Appellate Court relied, the Illinois Supreme Court expressly recognized that its statement that probation does not constitute punishment for double jeopardy purposes "stands in conflict with some decisions of the federal circuit courts." *Whitfield*, 888 N.E.2d at 1176 (*citing United States v. Martin*, 363 F.3d 25, 37-38 (1st Cir. 2004); *United States v. Carpenter*, 320 F.3d 334, 345 n.10 (2d Cir. 2003); *United States v. McMillen*, 917 F.2d 773, 777 (3d Cir. 1990)). Those conflicting federal court of appeals cases hold that the failure to provide credit for time served on probation or home detention would violate

the Double Jeopardy Clause because such sentences constitute forms of punishment. This Court should grant review to resolve the conflict between these courts on this point.

In addition to resolving the conflict between courts on the issue, this Court should grant review to clarify that the Illinois Appellate Court's decision essentially eliminating the protection against Double Jeopardy in every case involving a probation sentence in constitutionally untenable. Again, the key point is that the Court at a minimum should rule on these issues. To do otherwise would be to allow states like Illinois to obtain a sentence of probation against a defendant and then years later seek an additional sentence of imprisonment if the original probation sentence suffered some technical flaw. This Court should make clear that the Double Jeopardy guarantee of the Fifth Amendment does not permit such a patently unfair result. *See* U.S. Const., amend. V.

III. The Appellate Court's Decision Violates This Court's Precedent in *Blackledge v. Perry* by Allowing the State to Seek to Void Mr. Allen's Original Probation Sentence Following Mr. Allen's Successful Exercise of His Right to Appeal His Underlying Conviction.

This Court should grant review because the Illinois Appellate Court's decision allows the State to use the voidness doctrine unconstitutionally to discourage criminal defendants from exercising their right to appeal. This Court has recognized that a State may not punish a defendant for exercising his right to appeal. *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974). Moreover, this principle is so fundamental to Due Process that courts must presume the invalidity of greater sanctions sought by the State following a successful appeal in circumstances "that pose a realistic likelihood of 'vindictiveness.'" *See id.* at 27; *Thigpen v. Roberts*, 468 U.S. 27, 31 (1984) (applying presumption of vindictiveness following increased felony charges after appeal of initial misdemeanor charges).

By rejecting Mr. Allen's *Blackledge* claims, the Illinois Appellate Court allowed the State to take actions that could well discourage a defendant like Mr. Allen from exercising his right to appeal. The State's actions in attempting for the first time to have Mr. Allen's probation sentence declared void following the exercise of his right to appeal are precisely the type of "presumptively vindictive" actions that concerned this Court in *Blacklege*. As

the *Blackledge* Court recognized, because the State has an inherent, institutional interest in dissuading appeals, the State cannot be left free to "up the ante" against a defendant who chooses to exercise his right to appeal. Yet despite this Court's clear precedent the contrary, the Appellate Court' decision leaves the state free to do exactly that to criminal defendants in Mr. Allen's situation.

CONCLUSION

For the foregoing reasons, Walter Allen respectfully requests that a writ of certiorari issue to review the opinion of the Illinois Appellate Court in this matter.

Respectfully submitted,

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APPENDIX

Appendix A

Appellate Court of Illinois,
First District, First Division.
The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Walter ALLEN, Defendant-Appellant.

No. 1-07-1763.
Nov. 3, 2008.

Justice WOLFSON delivered the opinion of the court:

This case has taken a lengthy and tortuous path through the trial court and now to this court. It began in early 2001 when a trial judge imposed a sentence that was not authorized by statute.

On November 3, 2000, defendant Walter Allen was convicted of possession of a controlled substance with intent to deliver within 1000 feet of a building used for religious worship. Two months later, he was sentenced to 24 months' probation. Less than a year into his sentence, the State filed a petition for violation of probation, alleging defendant's probation should be revoked in light of his arrest in April 2001 for first-degree attempt murder, attempt armed robbery, and aggravated battery with a firearm. Defendant was convicted of the charges in 2005.

Following a probation revocation hearing on February 15, 2007, the circuit court revoked defendant's probation and sentenced him to 25 years' imprisonment. Shortly after defendant's probation was revoked, we reversed defendant's 2005 convictions and sent the case back for a new trial in People v. Allen, 376 Ill.App.3d 511, 314 Ill.Dec. 934, 875 N.E.2d 1221 (2007).

On appeal, defendant contends his probation violation conviction should be reversed because we have reversed and remanded the underlying conviction his probation violation was based on. In response to defendant's appeal, the State filed a separate motion with this court to void defendant's probation sentence for his 2000 possession conviction and remand for resentencing on the original charge, contending the sentence was void because defendant was Class X mandatory and statutorily ineligible for probation. We agree with the State.

FACTS

On November 3, 2000, defendant was convicted of possession of a controlled substance with intent to deliver within 1000 feet of a building used for religious worship. Following a sentencing hearing on January 10, 2001, the circuit court sentenced defendant to 24 months' probation: "so the remand is he should be discharged from County Jail. He is

placed on probation, open mandate to T.A.S.C., under Section 91-1/2 [sic], which is taking into consideration the Mental Health Code." The State responded that due to defendant's background, he should be sentenced to a mandatory Class X penitentiary sentence. The circuit court did not address the State's response. The presentence investigation report indicates defendant had six prior felony convictions, including three for residential burglary.

In the spring of 2001, two attempt armed robberies were committed at Four Star Dry Cleaners. During the second attempt robbery on April 17, 2001, Miye Goodson, an employee at the cleaners, was shot in the back. Defendant was initially arrested in connection with the first attempt robbery of the cleaners after he was identified in a photo array, but was tried only for attempt armed robbery and attempt murder in relation to the April 17 incident.

On August 10, 2001, the State filed a petition for violation of probation and warrant, arguing defendant's probation should be revoked in light of his arrest. Nothing much happened until October 5, 2005, when a jury found defendant guilty of first-degree attempt murder, attempt armed robbery, and aggravated battery with a firearm.

On February 15, 2007, the circuit court found defendant had violated his probation by committing the April 17, 2001, offenses. The State's evidence during the violation hearing consisted of the transcript of the 2005 trial testimony, the trial exhibits, the trial stipulations, and the certificate of defendant's conviction. Defendant stipulated to the admission of all of the evidence. On April 17, 2007, defendant was sentenced to a 25-year prison term for the probation violation. The court denied defendant's motion for a new hearing and reduction of sentence. Defendant appealed.

On September 28, 2007, we reversed defendant's first-degree attempt murder, attempt armed robbery, and aggravated battery convictions and remanded the cause for a new trial in People v. Allen, 376 Ill.App.3d 511, 314 Ill.Dec. 934, 875 N.E.2d 1221 (2007). We stayed defendant's appeal of the probation violation pending resolution of the State's petition for leave to appeal to the Illinois Supreme Court. After the supreme court denied the State's petition, defendant filed a motion to lift stay and for summary reversal of his conviction for probation violation. He contended that since the 2005 convictions were the sole basis for his probation violation, the violation must be vacated. In its response, the State agreed the stay should be lifted, but argued summary reversal was inappropriate in light of the remand for a new trial.

The State also filed a separate motion to vacate defendant's sentence on the 2000 possession conviction, contending, for the first time in a reviewing court, the probation sentence was void. The State contended defendant was ineligible for probation because he had several prior felony convictions and had been convicted of possession of a controlled substance with intent to deliver within 1000 feet of a building used for religious worship. See 720 ILCS 570/401(d) (West 2000); 720 ILCS 570/407 (West 2000). The State contended the circuit court's order of 24 months' probation was not authorized by statute. The State asked us to vacate as void his sentence on his 2000 possession of a controlled substance conviction, vacate the order revoking defendant's probation, and remand the cause for a new sentencing hearing.

On May 30, 2008, we: (1) denied defendant's motion for summary reversal; (2) denied without prejudice the State's motion to vacate as void defendant's sentence on his 2000 conviction for possession of a controlled substance; and (3) lifted the stay of defendant's appeal of his probation violation. We now consider the merits of defendant's appeal and the State's request that we void the probation.

DECISION

I. The State's Motion to Void Defendant's Sentence

A. Void Sentence

The State contends we must hold defendant's original sentence of 24 months' TASC probation for his 2000 conviction for possession of a controlled substance is void, relying on the same arguments raised in its motion to vacate sentence filed with this court.

[1] A sentence which is contrary to a statutory requirement is void and may be attacked at any time, either directly or collaterally. See People v. Whitfield, 228 Ill.2d 502, 510-11, 321 Ill.Dec. 233, 888 N.E.2d 1166 (2007), citing People v. Arna, 168 Ill.2d 107, 113, 212 Ill.Dec. 963, 658 N.E.2d 445 (1995); People v. Wade, 116 Ill.2d 1, 5-6, 107 Ill.Dec. 63, 506 N.E.2d 954 (1987). See also People v. Simmons, 256 Ill.App.3d 651, 652, 195 Ill.Dec. 295, 628 N.E.2d 759 (1993).

Defendant contends, however, that the State lacks jurisdiction to bring a motion to void the probation sentence in this appeal, citing People v. Flowers, 208 Ill.2d 291, 307, 280 Ill.Dec. 653, 802 N.E.2d 1174 (2004). In Flowers, the defendant filed a 604(d) motion to reject her guilty plea and reconsider her

sentence, contending in part that the portion of her sentence authorizing the Department of Corrections to withhold a part of her prison income to pay court costs was void because the Unified Code of Corrections did not authorize the withholding. The circuit court denied the motion as untimely and defendant appealed. The appellate court reversed, holding that even though the defendant's 604(d) motion was untimely, the requirements of Rule 604(d) were not jurisdictional and could be excused when consideration of an unauthorized aspect of a sentence would better serve the ends of justice. Flowers, 208 Ill.2d at 299, 280 Ill.Dec. 653, 802 N.E.2d 1174.

Reversing the appellate court, the supreme court held "[a] void order does not cloak the appellate court with jurisdiction to consider the merits of an appeal." Flowers, 208 Ill.2d at 307, 280 Ill.Dec. 653, 802 N.E.2d 1174. Although the supreme court recognized a void order may be attacked at any time, the court held "the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts." Flowers, 208 Ill.2d at 308, 280 Ill.Dec. 653, 802 N.E.2d 1174. "If a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that are void." Flowers, 208 Ill.2d at 308, 280 Ill.Dec. 653, 802 N.E.2d 1174. The only matter properly before the appellate court was the circuit court's lack of jurisdiction over Flowers' untimely Rule 604(d) motion. Flowers, 208 Ill.2d at 307, 280 Ill.Dec. 653,

802 N.E.2d 1174. Because strict compliance with Rule 604(d) was a condition precedent to an appeal on the merits, the supreme court held the appellate court "had no authority to intervene and vacate the portion of Flowers' sentence authorizing 50% of her income to be withheld." Flowers, 208 Ill.2d at 308-09, 280 Ill.Dec. 653, 802 N.E.2d 1174.

We find Flowers does not apply to the facts before us. In this case, defendant properly and timely appealed his probation revocation conviction. The probation order, by way of defendant's probation revocation conviction, is the subject of the appeal pending before us. In light of the context of this appeal, we find we have jurisdiction to consider the question of whether the probation order is void.

In Wade, the defendant pled guilty to robbery as part of a negotiated plea agreement in which the parties stipulated that he had no prior convictions. Under the plea agreement, the defendant was sentenced to 90 days in the Cook County Jail, with time considered served, and 36 months' probation. Nine months later, the circuit court was informed by a probation officer that the defendant had previously been convicted of armed robbery and rape, which made him ineligible for probation under the Unified Code of Corrections. The trial court held the order granting probation was void on the grounds that the defendant was not eligible at the time of sentencing,

rejecting the defendant's argument that the court had lost jurisdiction 30 days after entering the sentencing order. The defendant was allowed to withdraw his guilty plea. Following a jury trial, he was found guilty of robbery and sentenced to nine years' imprisonment. The appellate court affirmed the defendant's conviction.

On appeal, the defendant contended the circuit court did not have jurisdiction to vacate the sentence 11 months later. The State countered that because the circuit court lacked authority to impose probation, the first sentencing order was void and could be set aside at any time. The supreme court noted that it had previously held a trial court "has an obligation to order the criminal penalties mandated by the legislature." Wade, 116 Ill.2d at 6, 107 Ill.Dec. 63, 506 N.E.2d 954, citing People ex rel. Carey v. Bentivenga, 83 Ill.2d 537, 544, 48 Ill.Dec. 228, 416 N.E.2d 259 (1981). "A trial court, upon determining guilt, has no authority to assess a fine or impose a sentence other than that provided by statute." Wade, 116 Ill.2d at 6, 107 Ill.Dec. 63, 506 N.E.2d 954. The supreme court affirmed the defendant's conviction and sentence.

In Simmons, the defendant was convicted of aggravated discharge of a firearm and unlawful use of a firearm by a felon on July 30, 1991. He was placed on 30 months' probation, over the State's

objection that he was ineligible for probation because he had prior class 2 felony convictions. On December 20, 1991, the State filed a petition for violation of probation, alleging the defendant committed the offenses of possession of a stolen motor vehicle and burglary. The circuit court found defendant guilty of the violation and revoked his probation. He was sentenced to 15 years' imprisonment for the probation violation. On appeal, defendant contended the original order placing him on probation was void because he was ineligible for probation; that the subsequent order revoking his probation was also void; and, consequently, that his 15-year sentence for violating probation must be vacated as void.

We noted a sentence is void for lack of inherent power where the court orders a lesser sentence than is mandated by statute. Simmons, 256 Ill.App.3d at 652, 195 Ill.Dec. 295, 628 N.E.2d 759, citing Wade, 116 Ill.2d at 6, 107 Ill.Dec. 63, 506 N.E.2d 954. The circuit court placed the defendant on probation despite the State's objection that he was ineligible in light of his prior felony convictions. Relying on Wade, we held the order placing him on probation was void because he was ineligible. Simmons, 256 Ill.App.3d at 653, 195 Ill.Dec. 295, 628 N.E.2d 759. "The court lacked the inherent power to order a sentence lesser than mandated by statute." Simmons, 256 Ill.App.3d at 653, 195 Ill.Dec. 295, 628 N.E.2d 759. Because the underlying order of probation was void, we held the subsequent order revoking the defendant's probation

and the 15-year sentence imposed upon revocation of the probation were likewise void. We vacated the order revoking defendant's probation and his 15-year sentence, and remanded for resentencing on the defendant's original convictions. Simmons, 256 Ill.App.3d at 653, 195 Ill.Dec. 295, 628 N.E.2d 759.

In this case, defendant was convicted in 2000 for possession of a controlled substance with intent to deliver within 1000 feet of a building used for religious worship, a Class 1 felony. See 720 ILCS 570/401(d), 407(b)(2) (West 2000). On January 10, 2001, the trial court sentenced defendant to 24 months' TASC probation.FN1

FN1. Although the trial court indicated it was sentencing defendant to TASC probation under section 91 1/2 of the Dangerous Drug and Abuse Act (Ill.Rev.Stat.1977, ch. 91 1/2, par. 120.1 et seq.), we note section 91 1/2 had already been replaced by section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/40-10 (West 2000)) at the time of defendant's sentencing hearing.

Section 40-10(a) of the Alcoholism and Other Drug Abuse and Dependency Act (Act) (20 ILCS 301/40-10 (West 2000)) provides, in relevant part, that:

"If a court has reason to believe that an individual who is charged with or convicted with a crime suffers from alcoholism or other drug addiction and the court finds that he is eligible to make the election provided for under Section 40-5, the court shall advise the individual that he or she may be sentenced to probation and shall be subject to terms and conditions or probation under Section 5-6-3 of the Unified Code of Corrections." 20 ILCS 301/40-10(a) (West 2000).

Section 40-5(2) of the Act provides an addict or alcoholic who is charged with or convicted of a crime may elect treatment unless:

"(2) the crime is a violation of Section 401(a), 401(b), 401(c) where the person electing treatment has been previously convicted of a non-probationable felony or the violation is non-probational, 401(d) where the violation is non-probational, 401.1, 402(a), 405 or 407 of the Illinois Controlled Substances Act * * *." 20 ILCS 301/40-5(2) (West 2000).

[3] Pursuant to section 40-5(2), defendant was statutorily ineligible to be placed on probation under

section 40-10 of the Act because he was convicted of a crime under section 407 of the Illinois Controlled Substance Act. See 20 ILCS 301/40-5(2) (West 2000). Because defendant was ineligible for probation and was Class X eligible under section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2000)), the trial court should have imposed a mandatory sentence of "not less than 6 years and not more than 30 years" imprisonment. See 730 ILCS 5/5-8-1(a)(3) (West 2000). Despite the State's repeated objections during the sentencing hearing that defendant was Class X mandatory and ineligible for probation, the trial court disregarded the sentencing scheme and imposed TASC probation. "A trial court, upon determining guilt, has no authority to assess a fine or impose a sentence other than that provided by statute." Wade, 116 Ill.2d at 6, 107 Ill.Dec. 63, 506 N.E.2d 954.

[4] Defendant contends that under the unique circumstances presented in this case, it would be unjust to apply the general rule that a void sentence can be challenged at any time nearly six years after the completion and expiration of his probationary period

The State counters that personal service of a petition to revoke probation tolls the probation period until the hearing and disposition of the petition for violation, pursuant to section 5-6-4(a) of the Code

(730 ILCS 5/5-6-4(a) (West 2000)). The State filed a petition for violation of probation and warrant on August 10, 2001, about 8 months into defendant's 2-year probation period.

Defendant was sentenced under section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act, not the Unified Code of Corrections. Section 40-10 of the Act, however, specifically provides "the court shall advise the individual that he or she * * * shall be subject to the terms and conditions of probation under Section 5-6-3 of the Unified Code of Corrections." See 20 ILCS 301/40-10 (West 2000). One condition of probation is that a person on probation "not violate any criminal statute of any jurisdiction." 730 ILCS 5/5-6-3(a)(1) (West 2000). Section 5-6-4(a) of the Code provides how revocation of probation should be initiated if a condition of probation, which is spelled out in section 5-6-3, is violated. See 730 ILCS 5/5-6-4(a) (West 2000). We find defendant's probation period was tolled by the filing of the State's petition. Moreover, we are bound by supreme court precedent, which clearly provides "a sentence which is contrary to a statutory requirement is void and can be corrected at any time." (Emphasis added.) Whitfield, 228 Ill.2d at 510, 321 Ill.Dec. 233, 888 N.E.2d 1166.

[5] We also find the State's request to vacate defendant's probation violation conviction as void

and remand the cause for resentencing on the 2000 possession charge does not constitute double jeopardy, as defendant contends. Although the double jeopardy clauses of the United States and Illinois Constitutions protect a defendant from multiple punishments for the same offense (U.S. Const., amend. V; Ill. Const.1970, art. I, § 10; People v. Janovic, 365 Ill.App.3d 547, 549, 302 Ill.Dec. 801, 850 N.E.2d 238 (2006)), our supreme court has clearly said probation is not a "punishment" in the same sense as imprisonment is a punishment (Whitfield, 228 Ill.2d at 519-20, 321 Ill.Dec. 233, 888 N.E.2d 1166). "[A] defendant sentenced to probation, and then sentenced for the same offense, is not subjected to an unconstitutional second punishment for double jeopardy purposes." Whitfield, 228 Ill.2d at 520, 321 Ill.Dec. 233, 888 N.E.2d 1166.

In light of Wade and Simmons, we find the order placing defendant on probation is void because the trial court "lacked the inherent power to order a sentence lesser than that mandated by statute." Simmons, 256 Ill.App.3d at 653, 195 Ill.Dec. 295, 628 N.E.2d 759; Wade, 116 Ill.2d at 4-7, 107 Ill.Dec. 63, 506 N.E.2d 954. Because defendant's probation sentence is void, we must vacate his probation revocation conviction and sentence and remand the cause for resentencing on the defendant's original drug conviction in accord with the proper statutory mandates.

B. Prosecutorial Vindictiveness

[6] Defendant also contends the State's attempt to void his probation sentence-almost eight years after the sentence was entered-is an attempt to punish defendant for having won the appeal on his 2005 first-degree attempt murder, attempt armed robbery, and aggravated battery convictions. Defendant contends the State's efforts to void the sentence after he successfully appealed his 2005 convictions amount to prosecutorial vindictiveness.

[7] [8] Due process prohibits the State from punishing a defendant for exercising his right to appeal. Blackledge v. Perry, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2103, 40 L.Ed.2d 628, 634-35 (1974). "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." Blackledge, 417 U.S. at 28, 94 S.Ct. at 2103, 40 L.Ed.2d at 634-35.

A presumption of prosecutorial vindictiveness is warranted where a prosecutor brings additional or more serious charges against a defendant after he has been convicted of an offense and has overturned his conviction. People v. Hall, 311 Ill.App.3d 905,

911-12, 244 Ill.Dec. 617, 726 N.E.2d 213 (2000), citing Blackledge, 417 U.S. at 27-29, 94 S.Ct. at 2102-03, 40 L.Ed.2d at 634-35. "When the presumption is not applicable 'a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do.' " (Emphasis in original.) Hall, 311 Ill.App.3d at 912, 244 Ill.Dec. 617, 726 N.E.2d 213, quoting United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Once a presumption of vindictiveness is established, the prosecution must come forward with objective evidence of a legitimate motivation for filing the charge. Hall, 311 Ill.App.3d at 912, 244 Ill.Dec. 617, 726 N.E.2d 213. In this case, the State does not seek to bring an additional or more serious charge against the defendant.

Initially, we note the State's cavalier attitude toward the validity of defendant's probation sentence in this case. The State never filed a formal motion to void the probation sentence during the probation revocation proceedings in the circuit court. Nor did the State seek a supervisory order from our supreme court to correct the illegal sentence entered in the possession case, as it was entitled to do. See Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill.2d 200, 220-21, 319 Ill.Dec. 887, 886 N.E.2d 1011 (2008) ("As a general rule, this court will issue a supervisory order only when the normal

appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice, or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority.")

Contrary to defendant's contention, however, the State did not sit idly by until after defendant's 2005 convictions were overturned by this court. The record reflects the State vigorously argued defendant's sentence of probation was void before it presented evidence during the probation revocation hearing, which occurred several months before our reversal of defendant's conviction in Allen. The State also strenuously objected to the probation sentence during the original sentencing hearing in the underlying possession case, arguing defendant should be sentenced to a mandatory Class X penitentiary sentence in light of his criminal background.

In response to defendant's argument during the revocation hearing that he could not have been sentenced to a Class 1 felony because he received probation, the State said:

"This defendant never should have been sentenced to probation by Judge Himel or TASC or mental health probation. He should have been sentenced six to

thirty years in the Illinois Department of Corrections. * * * As far as Judge Himel is concerned, he entered a void sentencing order and it has no meaning to this Court and it should have no meaning in his violation of probation hearing. He got that probation. He was on probation. And we are not restricted by that sentence. In fact, the Court is obligated in this case to correct what Judge Himel did and give him what he deserves, which is a sentence commensurate with the mandatory X felon, six to thirty years in the Illinois Department of Corrections."

In response to the State's contentions, the trial court said, "The sentence that Judge Himel gave him, whether it was an illegal sentence or an improper sentence, I don't think has anything to do with what we do here."

Defendant contends that although the State was aware defendant's probation sentence was void since his initial sentencing hearing in 2001, the State made no attempt to void the sentence until defendant's probation violation hearing on February 15, 2007. We fail to see that the State had an earlier opportunity to raise the issue before this court. The record does not indicate defendant appealed his 2000 possession conviction, and the State does not have the right to directly appeal sentencing orders under

Supreme Court Rule 604 (a). 188 Ill.2d R. 604(a) ("In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963.") No reported case of prosecutorial vindictiveness exists that covers the facts present here-the probation sentence is void and the State raised the voidness issue during the original sentencing and probation revocation proceedings.

In light of the record before us, we find the State's attempt in this appeal to void defendant's probation sentence and remand the cause for resentencing does not amount to prosecutorial vindictiveness. Because we have determined defendant's probation sentence was void, we need not address his remaining contentions.

CONCLUSION

We void defendant's probation sentence, vacate his probation revocation conviction and sentence, and remand the cause for resentencing only on defendant's 2000 possession of a controlled substance conviction in accordance with the proper statutory mandates.

Probation vacated; cause remanded for resentencing.

R. GORDON, P.J., and HALL, J., concur.

Appendix B

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 28, 2009

Mr. John J. Hamill
Jenner & Block LLP
330 North Wabash Avenue
Chicago, IL 60611

No. 107671 - People State of Illinois, respondent, v. Walter Allen, petitioner, Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Burke, J., took no part.

The mandate of this Court will issue to the Appellate Court on March 4, 2009.

Appendix C

Appellate Court of Illinois,
First District, First Division.
The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Walter ALLEN, Defendant-Appellant.
No. 1-06-1943.
Sept. 28, 2007.

Justice WOLFSON delivered the opinion of the court:

Social scientists have been conducting research into the ability of one human being to identify another. Whether such an expert should be allowed to testify in a criminal case is a matter of broad discretion for the trial court. In light of the specific circumstances of this case, we hold reversible error was committed when the trial court refused to allow an expert to testify. We reverse the defendant's conviction and remand for a new trial.

This was a jury trial. The defendant, Walter Allen, was convicted of attempt murder, attempt armed robbery, and aggravated battery with a firearm. He was sentenced to a total of 43 years in prison.

In addition to the rejection of his expert witness, defendant raises fourth amendment and due process

issues that must be resolved before we reach the matter of the expert witness.

FACTS

On March 22, 2001, two black males entered Four Star Dry Cleaners, showed a gun, and demanded money. During the robbery, one of the men "pistol whipped" Che Shin, an employee at the cleaners. No money was taken. Defendant was identified as a suspect in the attempt robbery after two witnesses, Phil Jones and Calvin Smith, told police they saw defendant run past them near the cleaners shortly after the robbery occurred. Sometime before April 10, 2001, Shin identified defendant from a photo array as one of the people who robbed him. That is not the case before us, but it plays a role in the case we do decide.

On April 17, 2001, a second attempt armed robbery was committed at the same cleaners. Miye Goodson, an employee at the cleaners, was standing at the counter when two men entered the store. One of the men wore a dark hooded sweatshirt. The other man wore a yellow hooded sweatshirt with the hood up, and he stood and looked out the window. After one of the men approached the counter, Goodson asked if she could help him. The man did not respond. When Goodson asked again, the man reached into his pocket, pulled out a silver handgun, and said: "This

is a stickup. Give money." When Goodson turned around to get money from the cash register, she was shot in the back.

Before trial, defendant filed several pre-trial motions, including a motion to suppress Goodson's identification, a motion to quash defendant's arrest, and a motion to exclude gunshot residue evidence. The State filed a motion in limine to exclude the testimony of Dr. Steven Penrod, an expert in eyewitness identification.

During the December 21, 2004, hearing on defendant's motion to suppress identification, Goodson testified the police visited her in the hospital two days after she was shot and asked her if she was willing to look at photographs. She identified the defendant. Goodson could not recall how many photos the police showed her. Goodson said her husband had told her the police had caught the man who shot her before she identified defendant and signed his photo. Goodson admitted that when Mort Smith, an investigator hired by the defense, asked her how many pictures the police officers showed her, she responded "just the one." At trial she explained what she meant by that. She did not change her testimony. Goodson was not asked to make an in-person identification of the defendant until the preliminary hearing on December 21, 2004,

when he was sitting at counsel table in a jail uniform.

Detective John O'Shea testified that on the morning of April 17, 2001, he was scheduled to go to defendant's probation officer's office to arrest defendant for the March 22 attempt robbery. During roll call on that same morning, he learned a woman was shot during a robbery that morning at the cleaners. When defendant arrived at his probation officer's office, Detective O'Shea arrested him for the March 22 attempt robbery. Detective O'Shea did not have an arrest warrant. Shortly after defendant's arrest, Detective O'Shea transported him to the police station and requested an atomic absorption gunshot residue (GSR) test be performed on defendant's hands.

On April 19, 2001, Detective O'Shea went to Mount Sinai Hospital to interview Goodson regarding the second attempt robbery. He generated a black and white photo array on the ICAM system that included a photo of defendant. Detective O'Shea ended up using five photos that he thought were the most similar looking. When Detective O'Shea asked Goodson how she was feeling, she said she was "in pain" and "not feeling the best." Goodson agreed to look at some pictures. After viewing the photo array, Goodson identified defendant as the shooter. Goodson described the shooter to Detective O'Shea as

a "male black in his 30s" and "bald, no hair." Detective O'Shea admitted telling Goodson the police had some suspects before showing her the photo array. He did not tell her the suspect was in custody. Detective O'Shea testified substantially the same at the hearing on defendant's motion to quash arrest and suppress evidence.

Following arguments, the trial court denied each of defendant's motions. The court granted the State's motion in limine to exclude the testimony of Dr. Penrod.

At defendant's jury trial, Goodson testified that on April 19, 2001, two detectives visited her at Mount Sinai Hospital. After Goodson said she could identify the shooter, a detective showed her five pictures. She identified defendant as the person who shot her and signed the bottom of his photograph. Goodson also identified defendant in open court.

Goodson admitted that when Mort Smith, a private investigator for the defense, asked her how many photos the police had shown her at the hospital, she answered "just the one." Goodson explained she said "just the one" because she was only shown one picture of the man who shot her and four other pictures. During cross-examination, Goodson said she could not tell in what hand defendant was

holding the gun because she panicked when she saw it.

Detective O'Shea testified substantially the same as he had at the suppression hearing.

Officer Rivera, a forensic services unit investigator with the Chicago Police Department, testified that defendant did not want to participate in the GSR test. Several detectives physically restrained defendant and positioned his hands so the test could be administered. The detectives were not wearing gloves, and Officer Rivera admitted he and his partner had handled their guns on the day the test was administered.

Officer Robert Berk of the Illinois State Police Forensic Science Center testified that the GSR test showed elevated levels of barium, antimony, and lead on defendant's left palm. The elements are consistent with having handled, fired, or been in close proximity to a discharged firearm. He conceded, however, that these particles can be transferred from one surface to another. He noted there is only a six hour window of time for the administration of an atomic absorption GSR test after a gun has been fired. He admitted a positive test result does not necessarily prove an individual discharged a firearm. He believed, however, that the sources of lead,

barium, and antimony he detected on defendant's hand were from gunshot residue. A "scanning electron microscopy" (SEM) test did not confirm the presence of gunshot residue on defendant's clothing. Officer Berk admitted the SEM test is a more sensitive, selective, and specific test than the atomic absorption test he used.

Dr. Samuel Palenik, a forensic analytical microscopist, testified for the defense. He said the atomic absorption GSR test is an unreliable means of identifying whether GSR is present on a surface. He noted the elements detected by an atomic absorption test are found in the environment and many household items. According to Dr. Palenik, most law enforcement agencies, including the Chicago Police Department, have moved away from the test in light of the significant problems associated with it.

Mort Smith, a private investigator, testified that he visited Goodson at her home on May 8, 2004. Goodson told him the police showed her two or three photographs when they visited the hospital in 2001. On September 22, 2004, Smith visited Goodson at her home and taped the interview. Goodson told Smith the police showed her only one photograph when she was at the hospital.

The jury found defendant guilty of first-degree attempt murder, attempt armed robbery, and aggravated battery with a firearm. Following a sentencing hearing, the trial court sentenced defendant to a 29-year sentence for the Class X felony of attempt first-degree murder. Defendant was also sentenced to a consecutive 14-year sentence for attempt armed robbery. Defendant appeals.

DECISION

I. Motion to Suppress Evidence

[1] Defendant contends the trial court erred when it denied his motion to suppress evidence obtained in violation of his constitutional rights. Specifically, defendant contends the atomic absorption GSR test administered by the police was non-routine and completely unrelated to the March 22 attempt robbery crime he was lawfully arrested for, thus violating his fourth amendment rights.

[2] When reviewing a trial court's ruling on a motion to suppress evidence, the court's factual findings are reviewed for manifest error while the court's ultimate ruling is reviewed de novo. People v. Stehman, 203 Ill.2d 26, 33, 270 Ill.Dec. 426, 783 N.E.2d 1 (2002).

[3] Both the United States Constitution and the Illinois Constitution protect against unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const.1970, art. I, § 6. A warrantless search and seizure is per se unreasonable unless it comes within one of a few recognized and limited exceptions. Stehman, 203 Ill.2d at 34, 270 Ill.Dec. 426, 783 N.E.2d 1. "One such exception, which has been found reasonable under the fourth amendment to the United States Constitution, is a search incident to a lawful arrest." Stehman, 203 Ill.2d at 34, 270 Ill.Dec. 426, 783 N.E.2d 1, citing United States v. Robinson, 414 U.S. 218, 224-26, 94 S.Ct. 467, 471-73, 38 L.Ed.2d 427, 434-36 (1973).

Defendant does not contend the police lacked probable cause to arrest him for the March 22 attempt armed robbery. Instead, he contends that because he was neither under arrest for, nor a suspect in, the April 17 attempt robbery, the police had no reasonable basis or justification for performing a GSR test on him. Defendant contends the police must provide a rational justification for conducting a search unrelated to the crime for which a defendant is arrested, which they have failed to do in this case. Since the police were authorized to detain defendant, the question becomes to what extent he could be searched. See People v. Seymour, 84 Ill.2d 24, 33, 48 Ill.Dec. 548, 416 N.E.2d 1070 (1981).

While no Illinois court has specifically addressed this issue, similar issues have been addressed at length in the federal courts.

In Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), a case cited by defendant, the Supreme Court was asked to consider whether the police were justified in requiring petitioner to submit to a blood test after he was arrested while receiving treatment in a hospital following a car accident. The Court explained that the fourth amendment's proper function is "to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Schmerber, 384 U.S. at 768, 86 S.Ct. at 1834, 16 L.Ed.2d at 918.

The court noted that the percentage of alcohol in the blood begins to diminish shortly after drinking stops. Because the officer might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of the evidence, the court held the attempt to secure evidence of blood-alcohol content was lawful under the fourth amendment.

In United States v. D'Amico, 408 F.2d 331 (2nd Cir.1969), the court was asked whether a defendant's fourth amendment rights were violated when a federal agent, without a search warrant or the defendant's consent, clipped several strands of hair from the defendant's head while he was in custody. The court held the clipping of the few strands of hair unquestionably constituted a seizure that might conceivably be subject to the constraints of the fourth amendment. D'Amico, 408 F.2d at 332.

However, because the clipping by the officer of a few strands of hair was so minor an imposition that the defendant suffered no true humiliation or affront to his dignity, the court held a search warrant was not required to justify the officer's act. D'Amico, 408 F.2d at 333. The taking of several strands of hair while the defendant was in custody was no more prejudicial than taking his fingerprints or his photograph. D'Amico, 408 F.2d at 333. See also United States v. Richardson, 388 F.2d 842, 845 (6th Cir.1968) (examination of the defendant's hands for evidence of incriminating fluorescein powder held not to be a search within Schmerber).

Similarly, in United States v. Bridges, 499 F.2d 179 (7th Cir.1974), the court was asked to consider whether a hand swab test conducted on the defendant without his consent during an interrogation violated his fourth amendment rights.

Following the defendant's refusal to answer questions concerning his handling of explosives during an interrogation, federal agents swabbed his hand without his consent. Based on the chemical analysis of the swabs, the agents obtained a warrant to search defendant's car and house. Bridges, 499 F.2d at 184. The court found the swabbing was not an unreasonable search because it was "no more offensive to [the defendant's] person than fingerprinting or photographing him." Bridges, 499 F.2d at 184.

Defendant relies on People v. Machroli, 44 Ill.2d 222, 224, 254 N.E.2d 450 (1970), to support his contention that the GSR test constituted an unreasonable search and seizure in light of the facts of this case.

In Machroli, the defendant was arrested by a police officer who responded to a domestic disturbance call. Prior to the defendant's arrest, an officer saw him remove a small white box from his pant's pocket and place it on a dresser. After the defendant left the bedroom, the officer entered, picked up the box, opened it, and discovered three white tablets. The pills were identified as an illegal narcotic. In rejecting the State's justification for the search, the court held "[a] search incident to arrest is authorized when it is reasonably necessary to protect the arresting officer from attack, to prevent escape, or to discover the fruits of the crime." Machroli, 44 Ill.2d

at 224-25, 254 N.E.2d 450, citing Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The court noted the box and its contents were in no way related to the offense for which the defendant was arrested. The court held there was no justification other than curiosity for the officer's conduct in entering the bedroom and taking possession of the box. Machroli, 44 Ill.2d at 225, 254 N.E.2d 450.

Similarly, in People v. Burnett, 20 Ill.2d 624, 170 N.E.2d 546 (1960), our supreme court was asked to consider whether the search of defendant's apartment was incidental to his arrest. After defendant was arrested for operating a "lewd and lascivious" show, the police searched his apartment and found a locked tin box in the bedroom closet. The police opened the box and found obscene photographs. The supreme court held there was nothing in the record to indicate a search of the box was reasonably necessary to protect the officers or prevent the defendant's escape. Burnett, 20 Ill.2d at 625-26, 170 N.E.2d 546. Additionally, the police had already gathered all of the evidence necessary to prove or connect defendant to the crime he was arrested for. The court held the search of the box was not incidental to the arrest. The evidence was suppressed. Burnett, 20 Ill.2d at 626, 170 N.E.2d 546.

In Robinson, however, the Supreme Court noted the search incident to a lawful arrest exception to the fourth amendment's warrant requirement has historically been formulated into two distinct positions. Robinson, 414 U.S. at 224, 94 S.Ct. 467. "The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within control of the arrestee." (Emphasis added.) Robinson, 414 U.S. at 224, 94 S.Ct. at 471, 38 L.Ed.2d at 435. The Court noted that throughout its series of cases discussing the permissible area beyond the person of an arrestee that may be searched, "no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee." (Emphasis added.) Robinson, 414 U.S. at 225, 94 S.Ct. at 472, 38 L.Ed.2d at 436.

The Supreme Court was asked to consider whether a police officer's inspection of a crumpled cigarette package found on the defendant's person and seizure of heroin capsules found inside the package without a warrant were permissible after the defendant was lawfully arrested for operating a motor vehicle with a revoked license. The Court held a search of a defendant's person incident to a lawful arrest required "no additional justification." Robinson, 414 U.S. at 235, 94 S.Ct. at 477, 38 L.Ed.2d at 441. "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a

lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." Robinson, 414 U.S. at 235, 94 S.Ct. at 477, 38 L.Ed.2d at 441.

Our supreme court relied on Robinson in People v. Hoskins, 101 Ill.2d 209, 216, 78 Ill.Dec. 107, 461 N.E.2d 941 (1984). In Hoskins, the defendant approached an unmarked police car and offered to perform a sexual act for money. When she was told she was under arrest for prostitution, defendant ran from the officers and dropped her purse. After defendant was caught the police searched her purse. The officers found a hypodermic needle and a metal cap with cocaine adhering to it. The State argued the search was valid as incident to a lawful arrest. The supreme court held the search was proper under Robinson, which "authorizes a warrantless search of the defendant's purse, which is immediately associated with defendant's person, simply on the lawful, custodial arrest." Hoskins, 101 Ill.2d at 217, 78 Ill.Dec. 107, 461 N.E.2d 941. The court noted the Robinson holding is " 'a straight forward rule, easily applied, and predictably enforced.' " Hoskins, 101 Ill.2d at 217, 78 Ill.Dec. 107, 461 N.E.2d 941, quoting New York v. Belton, 453 U.S. 454, 459, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768, 774 (1981) (Supreme Court extended Robinson to all containers within the defendant's immediate control).

Because Machroli and Hoskins involved instances where the police searched the area in the vicinity of the defendant's control, not the defendant's person, we find they are distinguishable from the present case. See Robinson, 414 U.S. at 235, 94 S.Ct. at 477, 38 L.Ed.2d at 441; Hoskins, 101 Ill.2d at 217, 78 Ill.Dec. 107, 461 N.E.2d 941.

The hand swab performed on the defendant was a minor intrusion, no more offensive than fingerprinting or photographing. See Bridges, 499 F.2d at 184. Because the hand swabbing was so "minor an imposition that the defendant suffered no true humiliation or affront to his dignity," we find a search warrant was not required to justify the GSR test after defendant was in custody and while the arresting officers were assigned to investigate the April 17 attempt robbery. See Bridges, 499 F.2d at 184; D'Amico, 408 F.2d at 333. In light of the circumstances in this case, we find the hand swabbing was not an unreasonable search and seizure.

II. Identification Testimony

[4] Defendant contends the trial court's denial of his motion to suppress Goodson's identification was manifestly erroneous. Specifically, defendant contends the photo array used by the police was

unduly suggestive. Defendant also contends the admission of Goodson's in-court identification deprived him of his right to due process because the identification was not sufficiently independent from the highly suggestive photo array.

[5] [6] On a motion to suppress identification, the defendant bears the initial burden of establishing the pretrial identification was "so unnecessarily suggestive that it gave rise to a substantial likelihood of irreparable mistaken identification." People v. Curtis, 262 Ill.App.3d 876, 882, 200 Ill.Dec. 521, 635 N.E.2d 860 (1994). A trial court's ruling on a motion to suppress identification will not be set aside unless manifestly erroneous. Curtis, 262 Ill.App.3d at 882, 200 Ill.Dec. 521, 635 N.E.2d 860.

Defendant contends the photograph display was impermissibly suggestive because Goodson's contradictory testimony indicates she may have been shown only a single photo of defendant and no other suspects. We disagree.

Our supreme court has recognized "show-up" identifications, or identification procedures that include only a single defendant without any other suspects, carry "a dangerous degree of improper suggestion" (People v. Blumenshine, 42 Ill.2d 508, 512, 250 N.E.2d 152 (1969)), but the trial court here

found Detective O'Shea showed Goodson "a number of photographs" in the hospital. While we recognize Goodson's testimony at the suppression hearing and at defendant's trial wavered regarding exactly how many pictures she was shown in the hospital, she consistently said she was shown more than one photo in the array. Detective O'Shea also testified that he showed Goodson five pictures at the hospital, which included one picture of the defendant. Those photos are part of the record.

The issue of witness credibility was for the court to resolve. See People v. Pitman, 211 Ill.2d 502, 512, 286 Ill.Dec. 36, 813 N.E.2d 93 (2004) ("This deferential standard of review is grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony.") After reviewing the record, we see no reason to disturb the trial court's finding that Goodson was shown multiple photographs.

Alternatively, defendant contends that even if Goodson was shown a five-photo lineup, the lineup was still unconstitutionally suggestive due to the differences in appearance between defendant and the other alleged individuals in the photo array.

Initially, the State contends defendant waived this issue by failing to raise it in his motion to suppress. See People v. McAdrian, 52 Ill.2d 250, 253, 287 N.E.2d 688 (1972). Waiver aside, we reject defendant's contention.

[7] Individuals selected for a photo array lineup need not be physically identical. People v. Denton, 329 Ill.App.3d 246, 250, 263 Ill.Dec. 153, 767 N.E.2d 879 (2002). "Differences in their appearance go to the weight of the identification, not to its admissibility." Denton, 329 Ill.App.3d at 250, 263 Ill.Dec. 153, 767 N.E.2d 879.

Based on a careful review of the photographs presented as part of the record, we find the photo array was not impermissibly suggestive. All individuals displayed in the photo array had similar general physical characteristics. While defendant contends he was the only person who was actually bald in the photo array, we note all of the individuals had very closely cropped hair in the pictures, which appeared similar to defendant's hairstyle in the picture shown to Goodson.

We find the photo array was not unduly suggestive. In light of our determination, we need not address defendant's contention that the suggestive photo array tainted Goodson's in court identification.

III. Eyewitness Expert Testimony

[8] Defendant contends the trial court's exclusion of Dr. Steven Penrod's eyewitness identification testimony deprived him of his right to due process and his right to present a defense.

[9] [10] Generally, an expert will be permitted to testify if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. People v. Enis, 139 Ill.2d 264, 288, 151 Ill.Dec. 493, 564 N.E.2d 1155 (1990), citing People v. Jordan, 103 Ill.2d 192, 208, 82 Ill.Dec. 925, 469 N.E.2d 569 (1984). See also People v. Sargeant, 292 Ill.App.3d 508, 226 Ill.Dec. 501, 685 N.E.2d 956 (1997). Trial courts are given broad discretion when determining the admissibility of an expert witness. Enis, 139 Ill.2d at 290, 151 Ill.Dec. 493, 564 N.E.2d 1155. The question here is whether the trial court abused its discretion.

[11] When considering the reliability of expert testimony, the court should balance its probative value against its unfairly prejudicial effect. Enis, 139 Ill.2d at 290, 151 Ill.Dec. 493, 564 N.E.2d 1155. " In the exercise of his discretion, the trial judge should also carefully consider the necessity and relevance of

the expert testimony in light of the facts in the case before him prior to admitting it for the jury's consideration." Enis, 139 Ill.2d at 290, 151 Ill.Dec. 493, 564 N.E.2d 1155.

In Enis, our supreme court considered whether the defendant was entitled to introduce testimony of an expert witness regarding reliability of eyewitness testimony. The defense, in an offer of proof, claimed the expert would testify that: the relationship between confidence and accuracy is insignificant; the higher the stress level the less accurate the memory; the identification is usually worse if a weapon is present; and jurors give too much weight to time estimates.

The supreme court found the expert's testimony was not necessary because none of the witnesses was in a high stress situation, only one witness saw a weapon, and testimony regarding time estimates was not relevant to the case. Further, the court found that while the witnesses' confidence may have been at issue in the case, that factor alone did not warrant a new trial. Concluding the expert testimony would not have aided the jury in reaching its conclusion, the court held the trial court did not abuse its discretion in denying the testimony. Enis, 139 Ill.2d at 289, 151 Ill.Dec. 493, 564 N.E.2d 1155.

Other Illinois cases have uniformly upheld a trial court's refusal to allow expert eyewitness testimony. See People v. Tisdel, 338 Ill.App.3d 465, 273 Ill.Dec. 273, 788 N.E.2d 1149 (2003) (Tisdel II); People v. Tisdel, 316 Ill.App.3d 1143, 1159, 250 Ill.Dec. 570, 739 N.E.2d 31 (2000), rev'd on other grounds 201 Ill.2d 210, 266 Ill.Dec. 849, 775 N.E.2d 921 (2002) (Tisdel I); People v. Perruquet, 118 Ill.App.3d 339, 73 Ill.Dec. 802, 454 N.E.2d 1051 (1983) (trial court properly excluded expert testimony regarding effect of stress upon a victim's recall of events where a weapon is used); People v. Brown, 100 Ill.App.3d 57, 55 Ill.Dec. 429, 426 N.E.2d 575 (1981) (factors such as stress, opportunity to observe, distortion of memory, and problems of cross-racial identification are within realm of common experience and can be evaluated by jury without expert assistance); People v. Johnson, 97 Ill.App.3d 1055, 53 Ill.Dec. 402, 423 N.E.2d 1206 (1981); People v. Dixon, 87 Ill.App.3d 814, 43 Ill.Dec. 252, 410 N.E.2d 252 (1980) (trial court properly excluded expert testimony concerning unreliability of cross-racial identifications, reasoning trustworthiness of eyewitness observation is not generally beyond the common knowledge and experience of average juror). The Seventh Circuit also disfavors expert testimony on the reliability of eyewitness identification on the grounds that it does not assist the jury. See, e.g., United States v. Hall, 165 F.3d 1095 (7th Cir.1999).

In Tisdel II, we noted that numerous studies in the area of eyewitness psychology indicate there is significant potential for eyewitness error, and that jurors have misconceptions about the abilities of eyewitnesses. Tisdel, 338 Ill.App.3d at 467, 273 Ill.Dec. 273, 788 N.E.2d 1149. We held that a trial court should:

"carefully scrutinize the proffered testimony to determine its relevance-that is, whether there is a logical connection between the testimony and the facts of the case. Normally, expert testimony that is probative and relevant should be allowed." Tisdel, 338 Ill.App.3d at 468, 273 Ill.Dec. 273, 788 N.E.2d 1149, citing People v. Sargeant, 292 Ill.App.3d 508, 226 Ill.Dec. 501, 685 N.E.2d 956 (1997).

The defendant in Tisdel II contended the expert's testimony should have been admitted because it would have aided the jury in reaching a more informed decision as to the credibility of the eyewitness testimony. Because the record showed the trial judge considered the reliability and potential helpfulness of the testimony, balanced the proffered testimony against cases in which courts have upheld the exclusion of such evidence, and found the testimony would not assist the jury, we found the trial court properly exercised its discretion under Enis. Tisdel, 338 Ill.App.3d at 468, 273 Ill.Dec.

273, 788 N.E.2d 1149. However, we noted the trial court would not have abused its discretion had it allowed the testimony, given the facts of the case. Tisdel, 338 Ill.App.3d at 468, 273 Ill.Dec. 273, 788 N.E.2d 1149.

Several other jurisdictions have found the exclusion of expert testimony regarding eyewitness identification is an abuse of discretion in certain cases. See People v. LeGrand, 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 374 (2007); United States v. Brownlee, 454 F.3d 131 (3rd Cir.2006); United States v. Smithers, 212 F.3d 306 (6th Cir.2000); United States v. Lester, 254 F.Supp.2d 602 (E.D.Va.2003); United States v. Norwood, 939 F.Supp. 1132 (D.N.J.1996); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983); People v. Campbell, 847 P.2d 228 (Colo.App.1992).

In LeGrand, the defendant moved to introduce eyewitness expert testimony. According to a supporting memorandum of law, the expert would have testified to research findings regarding several factors that may influence the perception and memory of a witness and affect the reliability of eyewitness identifications. The expert would not, however, opine on the accuracy of any specific eyewitness identification. After conducting a Frye hearing, the trial court precluded the testimony on the ground that the expert's conclusions were not

generally accepted in the relevant scientific community.

The New York court of appeals held where there was no corroborating evidence connecting the defendant to the commission of the crime, and it was clear the case turned solely on the accuracy of the single witness' identification, it was an abuse of discretion for the trial court to prohibit the expert's testimony. LeGrand, 8 N.Y.3d at 457, 835 N.Y.S.2d 523, 867 N.E.2d 374. The court held the testimony of the defendant's expert would have benefitted the jury in evaluating the accuracy of the eyewitness identification. A new trial was ordered.

In Brownlee, the court held the primary issue before the jury was the reliability of the Government's four eyewitnesses. The court noted:

"Both [eyewitnesses] expressed high confidence in their identifications of [the defendant] as the perpetrator. To rebut the natural assumption that such a strong expression of confidence indicates an unusually reliable identification, [the defendant] sought to admit [expert] testimony that there is a low correlation between confidence and accuracy. We believe that [the expert's] proposed testimony 'is sufficiently tied to the facts of this case that it will aid the jury in resolving a factual dispute.' "

Brownlee, 454 F.3d at 144, quoting United States v. Downing, 753 F.2d 1224, 1242 (3rd Cir.1985).

The conviction was reversed and the case sent back for a new trial.

In the case before us, the defense submitted an offer of proof in the form of a report prepared by Dr. Steven Penrod, an experienced and highly-credentialed psychologist. We have examined the report in the context of the factual posture of the case-little or no corroboration of the testimony of a single identification witness who was not asked to identify the defendant in person until she saw him at counsel table, in jail uniform, at a hearing conducted 44 months after the attempt robbery.

Some of the data and conclusions referred to in the report do not fit the facts of the case. For example, data supporting the unreliability of cross-racial identifications would not fit because there is no indication Dr. Penrod considered the Korean eyewitness had been married to an African-American. Nor do we see the need in this case for expert testimony concerning the conduct of the photo array.

Other portions of the report are relevant and refer to commonly accepted misconceptions. For instance, studies have shown a witness's focus on a weapon indicates less attention is paid to encoding the perpetrator's characteristics. Other studies show jurors tend to rely on a witness's confidence in her identification as a guide to accuracy, but that there are low correlations between the witness's confidence and the accuracy of her identification.

In final argument, the prosecutor presented conclusions that would have been challenged by Dr. Penrod's data concerning weapon focus, stress, and the relationship between witness confidence and witness accuracy. The State's comments: "[t]here is no higher degree of attention than someone pointing a gun at you;" "[defendant's] face is burned in her memory forever;" "[t]here is no doubt she was certain;" and "if she is so certain, there is no reason and no doubt that you should be certain."

Neither at trial nor in this appeal does the State challenge the reliability of the research cited by Dr. Penrod. Nor did the trial court when it rejected the proposed testimony. The court merely said it did not believe:

"experts in this particular case will assist the jury in determining the identification in this case. I believe

it would probably confuse them more and I believe that the instruction that's provided by the Illinois Pattern Jury Instructions is sufficient."

Almost always, when a reviewing court upholds the trial court's discretion to reject the eyewitness identification expert's testimony it does so on the grounds that the testimony will not assist the jury. That is, jurors can use their own common sense and experience in life. See Enis, 139 Ill.2d at 288, 151 Ill.Dec. 493, 564 N.E.2d 1155. Reliability of the studies rarely is questioned. See U.S. v. Moore, 786 F.2d 1308, 1312 (5th Cir.1986) ("This court accepts the modern conclusion that the admission of expert testimony regarding eyewitness identification is proper, and we have no prior contrary authority which binds us. We cannot say such scientific data is inadequate or contradictory.") In Brownlee, the court referred to the research that demonstrates "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research." Brownlee, 454 F.3d at 143.

The research challenges the claim that the jury does not require expert assistance. As the prosecutor understood, reasonable people well might believe an eyewitness will be more accurate when faced with a weapon and when the witness shows confidence in the accuracy of her identification. The expert

testimony "dispels myths or attacks commonsense misconceptions about eyewitness identifications, such as the effects of stress and weapon focus on the accuracy of identifications." Tisdel, 338 Ill.App.3d at 467, 273 Ill.Dec. 273, 788 N.E.2d 1149. In Tisdel I we said:

"Numerous studies in the area of eyewitness psychology indicate there is a significant potential for eyewitness error and that jurors have misconceptions about the abilities of eyewitnesses." Tisdel, 316 Ill.App.3d at 1157, 250 Ill.Dec. 570, 739 N.E.2d 31.

Here, unlike the witnesses in Enis, Goodson was in a high stress situation, faced with a gun and an obvious threat to her life. She was the only eyewitness. Her apparent confidence on the witness stand was reflected in the prosecutor's rebuttal argument.

In Tisdel I the trial court considered the reliability and "potential helpfulness of the testimony," and "balanced the proffered testimony against cases in which this court has upheld the exclusion of such evidence * * *." Tisdel, 316 Ill.App.3d at 1158, 250 Ill.Dec. 570, 739 N.E.2d 31.

It is not our purpose to lower the bar for the exercise of broad discretion trial judges have when it comes to expert testimony on eyewitness identification. But present here is the failure to address the obligation we set out in Tisdel II:

"Trial courts should carefully scrutinize the proffered testimony to determine its relevance-that is, whether there is a logical connection between the testimony and the facts of the case." Tisdel, 338 Ill.App.3d at 468, 273 Ill.Dec. 273, 788 N.E.2d 1149.

No careful scrutiny took place in this case. Relevance of the different parts of Dr. Penrod's proposed testimony was not seriously considered. Nor their weight. The conclusion that the proposed testimony would confuse the jury had no considered basis. The balancing test requires a weighing of "probative value against its prejudicial effect." Enis, 139 Ill.2d at 290, 151 Ill.Dec. 493, 564 N.E.2d 1155. The test cannot be accomplished without an inquiry into the probative value of the proposed testimony and its relevance to the issues in the case. It is then that the inquiry shifts to the risk of unfair prejudice, which includes potential confusion.

Because of the trial court's failure to conduct a meaningful inquiry into Dr. Penrod's proposed testimony, under the specific circumstances of this case, we reverse the defendant's convictions and remand this cause for a new trial. We remand because we find the evidence sufficient to support a guilty verdict.

We express no opinion on whether the trial court on remand should allow any part of Dr. Penrod's offer of proof to be heard by the jury. We simply hold the offer of proof must be given serious consideration. If any of it is admitted, the witness should not be allowed to directly comment on Goodson's credibility or on the weight that should be given to her testimony. The expert might supply relevant data, but it is for the jury to decide what weight, if any, to give the research offered by the expert. See People v. Sargeant, 292 Ill.App.3d 508, 511, 226 Ill.Dec. 501, 685 N.E.2d 956 (1997) (the expert must not invade the province of the factfinder, while aiding the factfinder in reaching its decision).

IV. Other Claimed Errors

Defendant contends the trial court erred when it denied his motion to exclude the results of the GSR test, refused to permit counsel to publish the tape of Smith's interview with Goodson, and admitted Goodson's bloody clothing into evidence. In addition,

the defendant contends his trial counsel was ineffective for failing to argue the photo array used in this case was highly suggestive. We have examined these issues and find they have no merit. Defendant also raises issues concerning his sentencing. We see no need to discuss them.

CONCLUSION

For the reasons stated, we reverse defendant's convictions and sentences and remand this cause for a new trial.

Reversed and remanded.

GARCIA, and R. GORDON, JJ., concur.

Appendix D

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E

U.S. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.